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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 1220

HOWARD T. JENSEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

HOWARD T. JENSEN,
Box 680-P. M. B., Alcatraz, California,
Petitioner,

By MRS. HELEN L. GREENE,
Box 6841, Los Angeles 22, California,
Attorney In Fact, for Petitioner.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Fredrick Moore Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

Your petitioner, Howard T. Jensen, respectfully shows unto the Court that he was convicted in the United States District Court of the District of Utah,

Central Division, Salt Lake City, on the 16th day of April, 1943, under an indictment theretofore returned and filed in the aforesaid District Court charging petitioner with a violation of the Federal Kidnaping Act, 18 U.S.C.A., Section 408(a). No petition for a new trial was presented after verdict, and no appeal was prosecuted for review of the judgment of conviction rendered against your petitioner on the 16th day of April, 1943.

On October 31, 1946, petitioner filed in the trial Court a motion to vacate the judgment and sentence. The motion to vacate was grounded upon the fact that the indictment did not charge the necessary elements of the offense to constitute a violation of the Federal Kidnaping Act, and the judgment and sentence was void *ab initio,* should be vacated, set aside and held for naught, under the authority of this Court in *Chatwin v. United States,* 66 S. Ct. 233. The District Court refused to hear argument by counsel on behalf of petitioner and denied the motion. (R.* .....) On December 19, 1946, petitioner through aid of counsel filed a petition for a rehearing against the order made by the District Court on October 31, 1946. On the same date December 19, 1946, the District Court denied the petition for a rehearing. (R.* .....) On December 27, 1946, within eight days, petitioner filed notice of appeal, assignment of errors, praecipe calling for transcript of record to be certified to the United States Circuit Court of Appeals for the Tenth Circuit. (R.* .....)

*Page references to the record are omitted as petitioner was unable to obtain a copy of the transcript of record for that purpose.

On February 1, 1947, the transcript of record was duly filed in the office of the clerk of the Circuit Court below. *Jensen v. United States of America,* No. 3461. On February 10, 1947, the United States Attorney filed a motion in the United States Circuit Court of Appeals below to dismiss the appeal because it had not been taken within ten days under Rule 37 of the Federal Rules of Criminal Procedure, effective March 21, 1946. The Circuit Court below entered its order on February 13, 1947, dismissing the appeal as not having been taken pursuant to Rule 37 of the Federal Rules of Criminal Procedure, effective March 21, 1946. (R* .....)

JURISDICTION.

The opinion sought to be reviewed herein was filed by the United States Circuit Court of Appeals for the Tenth Circuit, February 13, 1947. This Court entered an order, on seasonable application therefor, extending the time for docketing the record and this petition until April 11, 1947, pursuant to the provisions of Rule 37(b)(2) of the Federal Rules of Criminal Procedure.* The record and petition were duly docketed herein on or before the 11th day of April, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U.S. C.A., Section 347.)

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*The original order of Mr. Justice Douglas extending the time for docketing the transcript of record and this petition for certiorari to April 14, 1947, was vacated and changed to read April 11, 1947.

QUESTIONS PRESENTED.

1. Where a motion to vacate judgment was filed after three years from the date of conviction in a District Court, and petition for a rehearing was filed against the order denying the motion to vacate, and a notice of appeal was filed within eight days after the order denying the petition for rehearing, was the appeal timely under Rule 37 of the Federal Rules of Criminal Procedure, effective March 21, 1946, and if not, is not Rule 37 inapplicable to the time for taking an appeal from a District Court to a Circuit Court of Appeals from an order denying a motion to vacate that was made after the expiration of the term of Court in which the conviction was had?

2. Where an indictment fails to charge the necessary elements of the offense to constitute a crime under the Federal Kidnaping Act, the omission being one of substance, is the judgment and sentence imposed on such indictment void, and if so, may it be vacated on a motion made after the expiration of the term of Court has passed in which the conviction was had?

REASONS ASSIGNED IN SUPPORT OF THE PETITION.

(1) The opinion entered by the Circuit Court of Appeals below is in direct conflict with this Court's decision in:

United States ex rel. Coy v. United States et al., 62 S. Ct. 1137;

therein this Court held:

"The failure to provide in Rule III or elsewhere for appealing an order like the present from the District Court to the Circuit Court of Appeals is a causa omissio which left in full force Section 8(c) of the Judiciary Act of February 13, 1925, 28 U.S.C., Section 230, which requires application for the allowance of appeal to the Circuit Court of Appeals *to be made within three months after the entry of the order appealed from.*"* (Italics supplied.)

(2) The opinion entered by the Circuit Court of Appeals below is in direct conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Gilmore v. United States,* 10 Cir., 124 F. (2d) 537.

(3) The opinion entered by the Circuit Court of Appeals below is in direct conflict with the decision of the Fifth Circuit Court of Appeals on the same subject in:

Meyers v. United States, 5 Cir., 116 F. (2d) 601;

therein the Court said:

"Rule III relates to appeals and requires that appeal shall be taken within five days 'after entry of judgment of convictions', except that where a motion for a new trial is timely made the ap-

*Rule III of the old Federal Rules of Criminal Procedure was superseded by Rule 37 of the New Federal Rules of Criminal Procedure, Effective March 21, 1946. Rule 37 extended the time from five days under the old Rule III to ten days under Rule 37 which applies to appeals after judgment of conviction. Petitioner's motion to vacate the judgment and sentence was like the Coy Case, supra, and the time in which to take an appeal from the order of the District Court to the Circuit Court of Appeals was not governed by Rule 37, that is, the time for taking the appeal was governed by Section 8(c) of the Judiciary Act of February 13, 1925, 28 U.S.C., Section 230.

peal may be taken within five days after entry of the order denying the motion. There has been no motion for a new trial, so the later provision does not apply. The judgment of conviction was entered four years before the judgment appealed from was ever made, and the period measured by five days from the entry of the judgment of conviction cannot apply. We are of opinion that the time for taking this appeal is not limited by any provision of Rule III, *and that the time limit applicable before the rule was made still obtains.* Under it the appeal is in time. The promptness in executing the criminal law sought by the rule is of no importance here, because the appellant is already imprisoned. The motion to dismiss is denied." (Italics supplied.)

(4) The opinion entered by the Circuit Court of Appeals below is a decision of federal questions under the Constitution and the Statutes of the United States, violative of the Constitutional rights of petitioner.

(5) The opinion of the Circuit Court of Appeals herein is one in direct conflict with the provisions of the Constitution of the United States, and the amendments thereto, the laws of the United States thereunder, and the decision of this Court in *United States ex rel. Coy v. United States et al.,* 62 S. Ct. 1137.

(6) The opinion of the Circuit Court of Appeals herein involved important questions of Federal law, both adjective and substantive, which have been definitely settled by this Court in *United States ex rel. Coy v. United States et al.* supra, 62 S. Ct. 1137, and

Chatwin v. United States, supra, 66 S. Ct. 233, and should be heard by this Honorable Court.

(7) The opinion of the Circuit Court of Appeals so far departs from the accepted record and usual course of Federal judicial proceedings, and is an erroneous action and decision of an important question of general law in conflict with the weight of authority, and in a way probably in direct conflict with applicable decisions of this Court, such as to call for exercise of this Honorable Court's power of supervision.

(8) The opinion of the Circuit Court of Appeals herein is in direct conflict with the decision of its own Circuit on the same subject in *Gilmore v. United States, supra,* 10 Cir., 124 F. (2d) 537, the Tenth Circuit Court of Appeals below expressly stating that:

> "It is further contended that the appeal should be dismissed because it was not taken within the time prescribed by Rule III, Rules of Practice and Procedure in Criminal Cases, 18 U.S.C.A. following Section 688, 292 U. S. 661, 54 S. Ct. xxxvii. The order denying the motion was entered on August 4, 1941, and the notice of appeal was filed fifteen days later. Section 1 of the Act of March 8, 1934, 48 Stat. 399, 18 U.S.C.A., Section 688, empowers the Supreme Court to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict; Section 2 provides that the right of appeal shall continue in those cases in which appeals were then authorized by law, but that rules may be prescribed governing the time and manner of taking such appeals; and Rule III, supra, provides that an appeal shall be taken within five days after

entry of judgment of conviction, except that where a motion for a new trial has been made, the appeal may be taken within five days after the denial of such motion, and that the appeal shall be taken by filing with the clerk of the trial Court a notice to that effect. That rule applies to the taking of an appeal from a judgment of conviction. *This is an appeal from an order denying a motion to vacate the judgment of conviction. The rule has no application here." Meyers v. United States,* 5 Cir., 116 F. (2d) 601. (Italics supplied.)

(9) The opinion of the Circuit Court of Appeals herein in simply dismissing the appeal after the case was filed and docketed in its Court without considering the merits, is contrary to law.

PRAYER FOR THE WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be granted by this Honorable Court, and that the order and judgment entered by the Circuit Court below dismissing the appeal be reversed, and for such other and further relief that this Honorable Court may deem just and proper, your petitioner will ever pray.

Dated, April 7, 1947.

Respectfully submitted,

HOWARD T. JENSEN,

Petitioner,

By MRS. HELEN L. GREENE,

Attorney In Fact, for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1220

HOWARD T. JENSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1943, after a trial by jury, petitioner was convicted in the United States District Court for the District of Utah on a charge of violating the Federal Kidnaping Act (18 U. S. C. 408a) and he was sentenced to imprisonment for ten years (R. 11–14). In October, 1946, he filed a motion in the convicting court to vacate the judgment and sentence, alleging that the indictment failed to allege all the necessary elements of the offense, and that the proof at the trial failed to establish that the officers whom he was alleged to have kid-

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naped were transported across state lines (R. 1–10). The motion was denied on October 31, 1946 (R. 15).

On December 19, 1946, petitioner filed a petition for rehearing of his motion to vacate the judgment (R. 15–23). The petition was denied on the same date (R. 23).

On December 27, 1946, petitioner filed a notice of appeal from the order of October 31, 1946 (R. 24). On motion of the United States Attorney (R. 29–30), the circuit court of appeals dismissed the appeal on the ground that it had not been taken within the 10-day period prescribed by Rule 37 (a) (2) of the Federal Rules of Criminal Procedure (R. 34; 160 F. 2d 104).

Petitioner seeks review of the order of the circuit court of appeals dismissing his appeal. He contends that, under the decision of this Court in *United States ex rel. Coy* v. *United States,* 316 U. S. 342, he had three months within which to appeal to the circuit court of appeals from the order of the district court denying his motion to vacate the judgment and sentence. He fails to realize that Rule 37 of the Federal Rules of Criminal Procedure remedied the *casus omissus* in Rule III of the old Criminal Appeals Rules referred to in the *Coy* decision, 316 U. S. at p. 345. Rule III of the old Criminal Appeals Rules provided for an appeal within 5 days "after entry of judgment of conviction." Rule 37 (a) (2) of

the Federal Rules of Criminal Procedure provides for an appeal "within ten days after entry of the judgment or order appealed from." Since, under the *Coy* decision, an order on a motion to vacate a judgment of conviction is an order in the criminal case, the circuit court of appeals was clearly correct in holding that petitioner's time to appeal to that court was governed by the 10-day period fixed in Rule 37 (a) (2) of the Federal Rules of Criminal Procedure.[1]

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

JUNE 1947.

[1] The petition for rehearing was filed more than a month after the time to appeal had expired, at a term subsequent to that at which the motion to vacate was denied (28 U. S. C. 190). It could not, therefore, serve to extend petitioner's time to appeal. See Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Sec. 354.

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